IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 956 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

POOJABEN ISHWARBHAI NATHANI GUARDIAN OF CHILD 1.SONI

Versus

STATE OF GUJARAT

Appearance:

MR ASHWIN V BHATT for Petitioner

MR SAMIR J DAVE, APP, for Respondents

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 14/12/2000

ORAL JUDGEMENT

Heard the learned counsel for the parties.

2. The petitioners, in all four in number, widow and children of late Ishwarbhai Nathani filed this petition under Article 226 and 227 of the Constitution of India

and prayed for direction to the respondents to pay Rs.12 lacs and/or any other amount which is deemed fit as compensation for the maintenance of the petitioner, her children and parents of the deceased. Second prayer has been made for direction to the respondents to pay Rs.5000/= p.m. as interim relief for the maintenance of the petitioner, her children and parents of the deceased till finalisation of this special criminal application.

3. Advance copy of this special criminal application was given in the Government Pleader's Office on 8th October, 1998. From the proceedings of this matter, I find that till 23rd November, 2000, it was placed on Board and was adjourned from time to time on all the dates. On 23rd November, 2000, this matter was admitted. The Court has observed that:

> In the absence of the affidavit-in-reply of the respondents No.1 to 3, the averments made in the special criminal application are to be taken to be uncontroverted. However, before passing the final order, I consider it to be in the larger public interest to grant one more opportunity to the respondents to file reply to the special criminal application subject to condition that the State of Gujarat shall deposit Rs.2 lacs with the Registry within a period of ten days from the date of receipt of writ of this order. The respondents are directed to file reply to the petition on or before 5th December,2000. The petitioners, if so desire, may file rejoinder thereof on or before 11th December, 2000.

In compliance to the order of this Court, it is not in dispute that Rs.2 lacs have been deposited by the respondents in the Registry of this Court. Reply to the special criminal application has been filed by the respondents to which rejoinder has been submitted by the petitioners also.

4. Learned counsel for the petitioners is unable to satisfy this Court how the petitioners are entitled for compensation of Rs.12 lacs. It is true that the petitioners left the matter ultimately to the discretion of the Court in the matter as to what amount has to be awarded to them as compensation. Affidavit has been sworn by the petitioner No.1 and the averments made in the special criminal application are verified on the basis of the knowledge. So the petitioner No.1 has not stated the facts from her personal knowledge. Be that as it may.

5. The respondents have not controverted the following facts:

(i) The husband of the petitioner No.1 was arrested by Sardarnagar Police for the offences punishable under sections 504, 506(2), 323 of I.P.C., 1860 and was produced before the Metropolitan Magistrate, Ahmedabad who sent him to the judicial custody in Sabarmati Central Jail, Ahmedabad.

(ii) On 5-5-1998, the husband of the petitioner No.1 was killed by one prisoner Ravibhai Manubhai Barot.

(iii) Prisoner Ravibhai Manubhai Barot was an under trial in judicial custody for the offences punishable under section 302 of I.P.C. in the Central Jail, Sabarmati, Ahmedabad.

(iv) Constable Udesinh Padamsinh Chauhan has filed a complaint against Ravibhai Manubhai Barot before the Sabarmati Police Station for the said incident and which is registered as I F.I.R. No.0122/98.

(v) In the complaint registered against Ravibhai Manubhai Barot, after investigation, the Police submitted the chargesheet and the trial court has acquitted him under the judgment dated 21st June, 1999. In the main offence for which that prisoner was detained in jail since 24th December, 1997, he has also been came to be acquitted under the judgment of the trial court dated 26th June, 2000.

6. The petitioners sent notice under section 80 of the Code of Civil Procedure, 1908 through advocate Ashwin V. Bhatt dated 18th June, 1998 demanding compensation. Final reply to this notice was given vide letter dated 30th November, 1998. The claim made by the petitioners for compensation was not accepted by the State Government. Hence, this petition has been filed on 24th October, 1998.

7. The petitioners in this petition have concealed this fact that to the notice given by them under section 80 of the Civil Procedure Code, 1908, interim reply thereto has also been sent to by the State of Gujarat vide letter dated 13th July, 1998. Final reply, no

doubt, has been given by the State of Gujarat after filing of the special criminal application. The petitioners have been put on correct track by advocate none other than who is appearing in the matter on their behalf but I fail to see why they have not continued to their logical conclusion in the matter on the track which they were advised to and followed by their own advocate. The advocate himself has taken a somersault and instead of filing the suit for compensation, he filed this petition under Articles 226 and 227 of the Constitution of India. Under Article 227 of the Constitution of India, how this petition is maintainable has not been disclosed or made clear by the petitioners. This petition is certainly not maintainable under Article 227 of the Constitution of India. It is true that in the cases of this nature, this Court has granted compensation on the principle of vicarious liability of the State of Gujarat but it is not a rule. It depends on the facts of each case. In such matters, the most appropriate and effective remedy is to file the civil suit. That is also known to or deemed to have been known to by the petitioners, which is clearly borne out, it is to be stated at the cost of repetition, from the document annexure `B' on the record of this special criminal application. Before filing of the suit for compensation in the matter, notice under section 80 of C.P.C., 1908, has to be given to the State of Gujarat and which has been given. Once the petitioners have considered that in this matter the suit is the only remedy, I fail to see any justification in their action to file this petition under Article 226 of the Constitution.

8. Otherwise also, no relief of the nature as prayed for under Article 226 of the Constitution can be granted in this matter in favour of the petitioners by this Court. However, I am not satisfied with the reply given by the respondent No.2. Prima-facie, I am satisfied that it is a case where the State Government is certainly liable for the vicarious liability of its Officers and servants. In the affidavit filed by the respondent No.2, though it is tried to be impressed upon that the basic necessities of life such as water, food, residence, clothes, blankets are provided to the prisoners and all the necessary arrangements are made for maintaining of the law and order in the jail, but I am not satisfied. As this petition has to be dismissed on the other grounds and the petitioners may file a civil suit in the matter, I do not consider it to be appropriate to deal with this matter and give any finding on the merits otherwise it may prejudice the case of the respondents in the suit. However, it is made clear that even if prisoner, Ravibhai

Manubhai Barot has been acquitted by the trial court for this offence of killing of the husband of the petitioner No.1, it is of no help or substance to the respondents and still the Court on proof of negligence on the part of the jail authorities certainly can award appropriate compensation. In the matter of grant of compensation for this type of incident which resulted in jail on the principle of vicarious liability of the State of Gujarat for its officers' and employees' negligence, carelessness and recklessness, it is not rule of thumb and the law that whatever claimed by the petitioners as amount of compensation, has to be granted. This is a matter where manifold disputed questions of facts may arise for consideration and same are to be decided, and only thereafter on satisfaction of the Court on the vital issues, re. vicarious liability of the State of Gujarat for negligence, carelessness and recklessness of its Officers and employees, decree can be passed.

9. Another important aspect is on what formula, basis and consideration, amount of compensation has to be determined. During the course of arguments, despite of repeatedly put by the Court to the learned counsel for the petitioner, he has failed to show on what formula, principles and approach the quantum of compensation has to be determined.

10. Shri Samir Dave, learned A.P.P. submitted that in such matters the principles on which amount is determined in the cases of motor vehicular compensation cases or workmen compensation cases, may be applied to this matter. As matter is not to be finally decided by this Court, I do not express any final opinion and leave it open for consideration and decision of the civil court in case where the petitioners file the civil suit for compensation.

11. However, from the facts of this case, it is difficult to even ascertain what was the income of the deceased. The Court is constrained to observe that the petitioners have not disclosed all the material facts candidly and honestly before this Court. Not only this, the petitioners have not produced any cogent and satisfactory evidence in support of the alleged income of the deceased. I do accept that fault may not be of the petitioners but nevertheless whosoever's fault may be there, the petitioners have to suffer. During the course of arguments, this Court put to the counsel appearing for the petitioners what is the basis for stating that the deceased was drawing the salary of Rs.2000/-p.m., he is unable to give any satisfactory reply. In the special

criminal application, the petitioners have not mentioned with whom the deceased was serving or what work he was doing and what was his monthly salary. If it was a case where the deceased was serving with some employer then it would not have been difficult for the petitioner No.1 to produce on the record cogent and satisfactory evidence for his employment as well as the monthly salary which the deceased was drawing on the date on which he was killed. In the absence of these material particulars and details, it is very difficult to accept what is averred that he was serving and drawing Rs.2000/-p.m. as salary. The respondent in such matters, would not have been in a better position than the petitioners to disclose the income and merely on the ground that they have not controverted this figure, it cannot be taken to be the income of the deceased per month. The petitioners have come up with a case that in addition to the monthly income what he was earning by serving, he was working as a salesman on commission for hosiery items, handloom items, bra, panty etc. and getting Rs.3000/- to Rs.4000/as commission. The petitioners have not produced any material and cogent evidence in support of these averments. Leaving apart that, even it not mentioned whether he was earning Rs.3000/- to Rs.4000/- as commission on sale of the items aforesaid per month or per year. Otherwise also, if we go by the affidavit filed by the petitioner No.1, this income of the deceased husband has been stated on the basis of the best of her knowledge. Be that as it may. Even if it is tentatively considered that he was earning Rs.3000/- to Rs.4000/- per month as sales commission then his total income comes to the tune of Rs.5000/- to Rs.6000/- per month and yearly income exceeds Rs.50,000/-, meaning thereby, taxable income but no record from Income Tax Department has been produced. In the presence of such pleadings how far it is correct on the part of the petitioners, may be laymen, but represented by advocate, to accept that this Court will grant relief in their favour. I am constrained to observe that the petitioners have not presented the petition in this matter with all necessary particulars and material facts duly supported by cogent evidence and they cannot be granted any relief.

12. The petitioners, if we go by the title of the case, are the widow of the deceased and three minor children. They may have no other source of income and miserable condition is that though they have a legal right of free legal services to be provided to them, that has not been availed of. The petitioners are not present before this Court. The Court is not in a position to ascertain whether they knew about their this legal right

or not. Similarly, it is also difficult to know whether they were made known of their this legal right by the concerned person or not. It is unfortunate that though they have a legal right for free legal services to be provided to them, in most of the cases, the beneficiaries are not getting the benefits. Where fault is there in our system to communicate this message to this class of litigants, it not a matter of consideration, decision in this case but it is a matter for serious concern of the persons concerned with the implementation of this program. The petitioners have a right to file the civil suit and if we go by the undisputed facts of this case, limitation for filing the suit would not have expired so far. The petitioners have proceeded in the matter and advised to proceed in the matter by filing the civil suit. That is different matter that somersault has been taken. No prejudice will be caused to them or they will not be deprived of alleged right of compenstion in case this petition is dismissed.

13. Taking into consideration the facts of this case that when the other side had not filed reply to the special criminal application, this Court directed on 23rd November, 2000, to the respondents to deposit Rs.2 lacs in the registry of the Court and this order has been complied with by the respondents. A question does arise for consideration is as to what to do with this amount of Rs.2 lacs deposited by the respondents. The petitioners may not succeed in the suit and in that eventuality they may not be awarded any compensation. Second eventuality may be where though their claim has been accepted but by applying reasonable criteria, formula or consideration, the amount of compensation to be awarded in their favour may not exceed Rs.2 lacs. Third possibility is that where the amount of compensation to be awarded may exceed Rs.2 lacs. Prima-facie, as stated earlier, the claim of the petitioners for compensation may be justified as I am not satisfied with the affidavit of the I.G. Prisons that the jail authorities and employees are not responsible in any manner whatsoever for this killing of the person by the co-prisoner. However, it is to be made clear that nothing has to be taken to have been decided finally by this Court in these proceedings in this respect. It is to be decided by the Civil Court, where petitioners approach to it, independently on the basis of the material produced without being influenced by these observations made by this Court. These are only tentative observations made by the Court for the purpose of deciding this case.

14. It is not a case where the petitioners have any

other source of livelihood. Keeping in view of the facts of this case together with socio-economic consideration as well as justice oriented approach as well as the equities with reference to both the parties, I am of the opinion that interest of justice will be met in case this amount of Rs.2 lacs is kept by this Court deposited in a beneficial investment scheme and monthly interest accrued thereon be paid to the petitioners during the pendency of the suit on condition that the suit is filed by them within a period of one month from the date of receipt of certified copy of this judgment by the petitioners. In case, ultimately, the petitioners fail in the suit, the respondents shall be entitled for the refund of this amount of Rs.2 lacs to them however whatever amount of interest accrued thereon and received by the petitioners shall not be refundable by the petitioners to the respondents. In case the suit claim of compensation is accepted and if the amount of compensation awarded is exceeding Rs.2 lacs then this amount has to be adjusted towards that claim. Where ultimately decree is passed for compensation of less than Rs.2 lacs then whatever excess amount is there, the respondents shall be entitled for refund thereof.

15. It is to be informed to the petitioners by the Registry by registered post A.D. that they have a legal right of free legal services, meaning thereby, all the expenses of filing of the suit including the court fees, advocate fees are to be borne out by the concerned Legal Services Committee. Registry to state that they are not required to engage any advocate and are not required to bear any costs of litigation or filing of suit etc.. Registry shall further inform to the petitioners to which Legal Services Committee they have to approach for this free legal services keeping in view their address and the Court in which the suit has to be filed. The petitioners may also be informed by the Registry that they can approach to Legal Clinic, which is working for 24 hours for free legal advice and further course to be taken by them. It is also to be informed to the petitioners by the Registry that in case the petitioners have any difficulty in the matter, they are free to approach to this Court in this very proceedings by filing a simple two lines note without assistance or aid of the advocate. The petitioner No.1 may appear before the Court accompanied by some of her male relative. All the above informations have to be sent by the Registry to the petitioners in vernacular language i.e. not in English. It is made clear that the petitioners have to inform to this Court of the factum of filing of the suit by them. In case if it is not informed to the Court then it would

be taken as if the suit is not filed and from that date, they shall not be entitled for interest accrued on this amount of Rs.2 lacs and forthwith this amount of Rs.2 lacs shall be refunded back to the respondents by the Registry.

16. Office is directed to place this matter in Court for ascertaining whether the suit has been filed or not on 12-02-2001. Registrar is directed to forthwith deposit this amount in "Post Office Monthly Income Scheme" with the High Court Post Office. The petitioner No.1 is directed to open an account in any nationalised bank near to her house and give necessary information of the account number, bank name etc.. to this Court forthwith. Post Office concerned is directed to remit this monthly interest amount to the account of the petitioner No.1 aforesaid. This account has to be opened in the name of the Registrar with the condition of payment of accrued interest to the petitioner No.1 subject to the conditions aforesaid.

17. The special criminal application is dismissed. Rule discharged. In the facts of this case, no order as to costs.

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